Supreme Court, U.S.
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No. _____

In the
# Supreme Court of the United States
October Term, 1998

John W. Westling and Sharon Westling,
*Petitioners,*

v.

County of Mille Lacs, and
The State of Minnesota,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

When real property has no market value because of environmental contamination, may a State nonetheless assign the property a fictional "contamination value" (equal to the property's contamination-related diminution in market value) and then tax that value as if it represented a pecuniary property interest, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i
TABLE OF CONTENTS ..... ii
TABLE OF AUTHORITIES ..... iii
OPINIONS BELOW ..... 1
JURISDICTION ..... 1
CONSTITUTIONAL PROVISIONS AND STATUTES ..... 1
STATEMENT OF THE CASE ..... 2
*The "Contamination Tax"* ..... 2
*The Westlings' Challenges to that Tax* ..... 3
REASONS FOR GRANTING THE PETITION ..... 5
*The Decision of the Minnesota Supreme Court Conflicts with Decisions of this Court* ..... 6
*The Question Presented is Important* ..... 10
CONCLUSION ..... 12

APPENDIX

Opinion of the Minnesota Supreme Court ..... A-1
Findings of Fact, Conclusions of Law and Order for Judgment of the Minnesota Tax Court ... A-17
Judgment ..... A-26
U. S. CONST., amend. XIV, § 1 ..... A-27
MINN. CONST., art. X, § 1 ..... A-28
MINN. STAT. §§ 270.91-.98 ..... A-29

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Adams Express Co. v. Ohio*, 166 U.S. 185 (1897) ..... 6

*Cumberland Coal Co. v. Board of Revision*,
284 U.S. 23 (1931) ..... 6-7

*Dawson v. Kentucky Distilleries & Warehouse Co.*,
255 U.S. 288 (1921) ..... 9

*Hopkins v. Southern California Telephone Co.*,
275 U.S. 393 (1928) ..... 8

*Sioux City Bridge Co. v. Dakota County, Neb.*,
260 U.S. 441 (1922) ..... 6

*Wagner v. City of Covington*, 251 U.S. 95 (1919) ..... 9

*Wheeling Steel Corporation v. Glander*,
337 U. S. 562 (1949) ..... 7

*WHYY, Inc. v. Borough of Glassborough*,
393 U.S. 117 (1968) ..... 7

## STATE CASES

*Contos v. Herbst*, 278 N.W.2d 732 (Minn. 1979) ..... 7

*Westling v. County of Mille Lacs*, 581 N.W.2d 815 (Minn. 1998) ..... 1

*Westling v. County of Mille Lacs*, Nos. C1-96-264, C2-95-327, C3-96-265, 1997 WL 74612 (Minn. Tax Ct. Feb. 19, 1997) ..... 1

## STATUTES AND RULES

28 U.S.C. § 1257(a) ..... 1

28 U.S.C. § 2403(b) ..... 1

MINN. STAT. §§ 270.91-.98 ..... *passim*

MINN. STAT. § 115B.17 ..... 3

SUP. CT. R. 29.4(b) ..... 1

## MISCELLANEOUS

WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION (2d ed. 1984) ..... 10

John W. Westling and Sharolyn Westling respectfully petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court in this case.

## OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at *Westling v. County of Mille Lacs*, 581 N.W.2d 815 (Minn. 1998). *See also* App. A-1. The opinion of the Minnesota Tax Court is unreported, but is available at *Westling v. County of Mille Lacs*, Nos. C1-96-264, C2-95-327, C3-96-265, 1997 WL 74612 (Minn. Tax Ct. Feb. 19, 1997). *See* App. A-17.

## JURISDICTION

Judgment was entered in the Minnesota Supreme Court on August 17, 1998. *See* App. A-26. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The notifications required by Rule 29.4(b) have been given. 28 U.S.C. § 2403(b) may apply. This petition has been served on the Attorney General of the State of Minnesota.

## CONSTITUTIONAL PROVISIONS AND STATUTES

Section 1 of the Fourteenth Amendment to the United States Constitution; Article X, § 1, of the Minnesota Constitution; and Minnesota Statutes §§ 270.91-.98 are set forth in the Appendix to this Petition. *See* App. A-27 to A-35.

## STATEMENT OF THE CASE

### *The "Contamination Tax"*

In 1993, the Minnesota Legislature enacted a new "contamination tax," effective beginning with 1994 taxes and first payable in 1995. *See* App. A-4; MINN. STAT. §§ 270.91-.98 (App. A-29 to A-35). The contamination tax is imposed annually on the "contamination value" of real property in Minnesota. MINN. STAT. § 270.91, subd. 1. "Contamination value" is defined as "the amount of the market value reduction, if any, that is granted for general ad valorem property tax purposes for the assessment year because of the presence of contaminants." MINN. STAT. § 270.93. In other words, the State of Minnesota requires county assessors to assign a fictional pecuniary value to the diminution in property value that is attributable to environmental contamination, *see* MINN. STAT. § 270.96, subd. 1, and an annual tax on that fictional property interest is then "payable at the same time and manner as the regular ad valorem property tax." MINN. STAT. § 270.95.

The "contamination tax" "is calculated by multiplying the 'contamination value' by the property's class rate for *ad valorem* property tax, multiplied by another factor that varies according to certain characteristics of the property and the property owner." App. A-5; *see* MINN. STAT. § 270.91. For purposes of the tax, then, there are no new classifications: the "contamination value" is taxed as if it were real property of a certain class (*e.g.*, residential, commercial/industrial, or agricultural). Rather than applying that tax to the market value of the real property that actually falls within the particular classification, however, the tax is applied to a so-called property "value" that is purely a creation

of the Minnesota Legislature and which has none of the characteristics of a genuine property interest.

### *The Westlings' Challenges to that Tax*

Petitioners John and Sharolyn Westling own two contiguous parcels of property, 13.06 acres in total size, located in Mille Lacs County, Minnesota. Improvements to the properties consist of two connected office warehouse buildings. The properties are leased to Westling Manufacturing Company, which remanufactures automotive parts. Tests done in the fall of 1989 revealed that the soil and ground water on the properties were contaminated by tetrachloroethene, a volatile organic compound.[1]

The Westlings and Respondent Mille Lacs County agree that as a result of the contamination, the subject property had a negative market value on the assessment dates of January 2,

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[1] The "contamination tax," which is a tax on a putative property interest, exists apart from Minnesota's remedial statutes governing the monitoring and cleanup of environmental pollution. As was noted by the Minnesota Supreme Court, "Westling Manufacturing Company has spent more than $1,085,626 to date to investigate, monitor and cure the contamination, pursuant to a 'response plan' approved by the [Minnesota Pollution Control Agency]. The future cleanup is estimated at approximately $3,581,000." App. A-3 to A-4 (footnote omitted). Any costs incurred by the State of Minnesota in connection with environmental regulation enforcement may be recovered by the State under a provision of the Minnesota Environmental Response and Liability Act, *see* MINN. STAT. § 115B.17, subd. 6, which is patterned on its federal counterpart, the Comprehensive Environmental Response, Compensation and Liability Act, popularly known as "CERCLA." *See generally* App. A-2 n.1.

1994, and on January 2, 1995. *See* App. A-19. Nonetheless, the Mille Lacs County Assessor assigned a "contamination value" to the property of $1,003,400 on January 2, 1994, and $1,600,000 on January 2, 1995. *See ibid.* A "contamination tax" was then imposed in the amount of $22,278.50 for 1994, payable in 1995, and $36,000.00 for 1995, payable in 1996. *See ibid.*

Petitioners challenged the constitutionality of the contamination tax under both the United States and Minnesota Constitutions, and did so on an undisputed record. No factual issues were disputed by the parties, and there was no trial. Rather, the case was submitted to the Minnesota Tax Court on written stipulations of fact and written briefs, including a stipulation that the Westlings' property had no market value. *See* App. A-17.

Petitioners' challenges to the tax under the United States Constitution were raised in their petitions to the Minnesota Tax Court and the Minnesota Supreme Court. The constitutionality of the tax was specifically addressed by both courts.

In its Findings of Fact, Conclusions of Law and Order for Judgment, the Minnesota Tax Court stated the issue as follows:

> The issue in this case is whether Minn. Stat. §§ 270.91 through 270.98 (the "Contamination Tax") violate Article 1 § 13 and Article X § 1 of the Minnesota Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

App. A-17. The Minnesota Tax Court stated its conclusion as follows:

> The Contamination Tax does not violate the Minnesota or United States Constitutions.

App. A-19.

Petitioners then sought review in the Minnesota Supreme Court. In its decision, that court stated the first issue presented as follows:

> The Westlings argue, first, that imposition of the contamination tax violates the uniformity clause of the Minnesota Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

App. A-7. The Minnesota Supreme Court rejected Petitioners' arguments:

> We conclude, therefore, that the contamination tax, Minn.Stat. §§ 270.91-.98, does not violate the United States Constitution or the Minnesota Constitution. Affirmed.

App. A-16.

## REASONS FOR GRANTING THE PETITION

The decision of the Minnesota Supreme Court in this case is in direct conflict with decisions of this Court, which has repeatedly held that imposition of property taxes on any basis other than assessed property value violates the Equal Protection Clause of the Fourteenth Amendment. The question is important not only because it affects many Minnesota property owners, but

because it involves a fundamental constitutional principle of property taxation. If the United States Constitution permits a state to create a fictional property value and then assess taxes on that fictional property value, there can be little doubt that many states other than Minnesota will find use for such means of revenue enhancement.

### *The Decision of the Minnesota Supreme Court Conflicts with Decisions of this Court*

This Court has consistently held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires property taxes to be based on actual property values. The basic principle was stated by the Court over one hundred years ago: "[I]t is a cardinal rule, which should never be forgotten, that whatever a property is worth for the purposes of income and sale it is also worth for purposes of taxation." *Adams Express Co. v. Ohio*, 166 U.S. 185, 221 (1897).

Since *Adams Express Co.*, this Court has consistently focused its attention on actual property values when reviewing state laws imposing property taxes. In *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441, 445 (1922), the Court held that systematic, arbitrary or intentional discrimination in the valuation of properties for tax purposes violates the Equal Protection Clause of the Fourteenth Amendment. In *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 29 (1931), the Court said:

> [T]he fact that a uniform percentage of assigned values is used, cannot be regarded as important, if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual

> values so that property in the same class as that of a complaining taxpayer is valued at the same figure . . . as the property of other owners which has an actual value admittedly higher.

More recently, this Court has said that all property owners "are entitled to equal protection . . . at least to the extent that their property is entitled to an equally favorable ad valorem tax basis." *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 571-72 (1949); *see WHYY, Inc. v. Borough of Glassborough*, 393 U.S. 117, 119 (1968).

In spite of such pronouncements by this Court, the Minnesota Supreme Court has decided that property tax may be imposed on private property without regard to its actual market value, may be imposed on property which has no value, and may even be imposed on value that property has lost due to contamination. In rejecting Petitioners' argument that taxation of property on any basis other than the actual value of the property violated both the Minnesota and United States Constitutions, the Minnesota Supreme Court held that—at least in Minnesota—property may be taxed without reference to the property's actual value. *See* App. A-9 n.6 (citing *Contos v. Herbst*, 278 N.W.2d 732 (Minn. 1979)).

The property tax approved by the Minnesota Supreme Court is a tax imposed on the property's "contamination value," a fictional property value that represents the absence of market value. Thus, the Minnesota Legislature created, and the Minnesota Supreme Court approved, a new species of "value" to be used as a base for the imposition of a property tax. Contamination value is, of course, not value at all. It is a reduction in value, a loss of value. It is not in any way the kind

of market value that this Court has said must be the basis for constitutionally permissible imposition of a property tax. Rather, the "contamination tax" results in one parcel of property being taxed based on its market value while an adjacent parcel is taxed based on the absence of, or reduction in, market value.

The Minnesota Supreme Court generously characterized the contamination tax as "unusual" and "unique." App. A-2. It is not only unusual and unique; it is also a violation of Petitioners' rights to equal protection under the Fourteenth Amendment to the U. S. Constitution. The "creativity" of the Minnesota Legislature—and of legislatures across this country—is not to be underestimated. If legislatures may indeed create pecuniary property rights out of whole cloth and then tax those rights as if they represented an asset to the taxpayer, there is no telling where such methods of revenue enhancement will lead.

In attempting to rescue the contamination tax, the Minnesota Supreme Court said that it merely created classes of property; actually, classes within classes. *See* App. A-11. This is not the case. The statute does not define or even mention any new classes of property. Instead, it defines contamination tax rates as percentages of the class rates for the class in which a property is classified for purposes of the regular ad valorem property tax. The Westlings' property remains in the class in which it was before the creation of the contamination tax.

Under the Fourteenth Amendment, all those within the same class are protected against unequal taxation; all are entitled to like treatment. *Hopkins v. Southern California Telephone Co.*, 275 U.S. 393, 403 (1928). What has changed as a result of the contamination tax is that the Westling property is no longer taxed based on its market value as are all other properties within the

same class (excluding, of course, any others that may be subject to the contamination tax).

The Minnesota contamination tax is a tax based on a fictional "value" which has been approved by a state supreme court based on nonexistent new classes of property. When this Court is called upon to test a state tax by the provisions of the Constitution of the United States, its decision must depend not on the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather upon the practical operation and effect of the tax as applied and enforced. A state court cannot render valid, by misdescribing it, a tax which in substance and effect is repugnant to the federal Constitution. *Wagner v. City of Covington*, 251 U.S. 95, 102 (1919).

There is no question what the Minnesota Legislature was doing when it enacted the "contamination tax." It did not create any new classes of property. Rather, it created a new means of assessing the value of existing, already classified, real property. Once that fictional property value (the "contamination value") is determined, the tax on that property value is then determined by reference to the class in which the real property falls. Quite simply, the Legislature created a property value where none exists in the real world and then directed that its creation be subject to tax as if it were a marketable improvement to the existing real property. That the tax is labeled a "contamination tax" rather than a "property tax" is of no consequence, for the name by which a tax is described in the statute is immaterial. Its character must be determined by its incidents. *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288, 292 (1921).

This tax, labeled a "contamination tax," results in real property of comparable value in identical classes being taxed unequally. Real property with no market value whatsoever is taxed as if a willing buyer would pay hundreds of thousands of dollars for it. This is pure fiction, and it is a fiction that violates the Petitioners' rights to equal protection under the Fourteenth Amendment.

### *The Question Presented Is Important*

The effective rate of a property tax is the combined base-rate structure. 1 WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 15 (2d ed. 1984). Therefore, in order for a tax to be imposed uniformly, the tax base (as well as the rate) must be uniform. This is why it is so important for property taxes to be based on actual property values.

The oxymoron "contamination value" does not exist in the real world. The fact that property is contaminated does not give it any value, but rather reduces its value. What the Minnesota Legislature has done is create a mere fiction for the purpose of defining and establishing a system of taxation in which private property is deliberately and intentionally overvalued for property tax purposes. The result is a tax which is totally arbitrary since it is based on something which does not actually exist in the real world. The obvious purpose of the Minnesota contamination tax statute is to authorize and direct overvaluation of property for tax purposes.

The issue in this case, simply stated, is whether a state can just make up any kind of imaginary thing and then impose a tax on it. If it can, then, so far as property taxes are concerned, the Equal Protection Clause is meaningless, for equality cannot be

based on a mere fiction which, since it does not exist in the real world, cannot be measured and compared.

If taxes may be levied on imaginary property interests, anyone in Minnesota who happens to be politically unpopular may be subjected to taxes which are far greater than those paid by others owning property of the same value. In the case of the contamination tax, it is owners of contaminated properties who happen to be politically unpopular, but it could just as well be any other group of citizens who find themselves out of public favor. Such is the result of eliminating the protection given all citizens by the Equal Protection Clause. Certiorari should be granted in this case to reaffirm that property owners throughout this country receive the benefit of the Equal Protection Clause's guarantee of freedom from arbitrary and discriminatory taxation of private property.

The issue presented in this case is a pure one. There are no factual disputes of any sort. If the Court grants the petition for review, the only issue will be the ability of a state legislature to create fictional property values and then direct that taxes be assessed upon those "values" as if they represented actual pecuniary value. When the next challenges to such a use of the legislative taxing power reach this Court, they may well not present the issue for review in as uncluttered a fashion.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: November 16, 1998

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John W. WESTLING, et al., Relators,

v.

COUNTY OF MILLE LACS, Respondent.

No. C3-97-812.

Supreme Court of Minnesota.

July 9, 1998.

Taxpayers challenged imposition of tax on the contamination value of their commercial real property. The Tax Court, Kathleen Doar, J., upheld constitutionality of contamination tax statutes, and taxpayers appealed. The Supreme Court, Gardebring, J., held that: (1) imposition of contamination tax violated neither equal protection clause nor state constitution's uniformity clause, and (2) imposition of contamination tax theoretically in excess of the value of taxpayers' property was not a "governmental taking" without compensation.

Affirmed.

William L. Lucas, Edina, for Relator.
John H. Wenker, Assistant Mille Lacs County Attorney, Milaca, for Respondent.
Hubert H. Humphrey III, Attorney General, State of Minnesota by Kelly S. Kemp, Assistant Attorney General, St. Paul, for Intervenor.

Heard, considered and decided by the court en banc.

OPINION

GARDEBRING, Justice.

In this case we consider the constitutionality of an unusual tax provision that functions to recapture property taxes lost when the assessed value of a parcel of property is reduced due to environmental contamination. Relators John and Sharolyn Westling challenged the "contamination tax," Minn.Stat. §§ 270.91-.98 (1996), arguing both that the imposition of the contamination tax violates the uniformity clause of the Minnesota Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution and that it is a governmental taking without due process, in violation of the "takings" clauses in the Minnesota Constitution and the Fifth Amendment to the United States Constitution. The tax court upheld the constitutionality of the statute and we affirm, finding no constitutional infirmity in this unique form of taxation.

The Westlings own two contiguous parcels of property in Mille Lacs county, totaling 13.06 acres in size. The parcels were purchased from Mr. Westling's father in 1987 and 1989. The property, which is improved with an office warehouse structure of over 88,000 total square feet, is leased for $114,000 annual rent to Westling Manufacturing Company. The company remanufactures automotive parts. The site is contaminated by tetrachloroethene, a degreaser used in the remanufacturing process. The property is listed on the state "Superfund permanent list of priorities," which governs the order in which hazardous waste sites in the state are to be cleaned up.[1] John Westling has been determined by the

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[1] The Minnesota Environmental Response and Liability Act (Minn.Stat. ch. 115B.01-.24 (1996)), (hereafter "MERLA") was patterned after its federal counterpart, the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §§ 9601-75 (1997) (hereafter "CERCLA")). CERCLA and MERLA govern liability, cleanup and damages for pollution caused by a release or threatened release of a hazardous substance as defined by state and federal law. *See* 42 U.S.C. § 9601(14); Minn.Stat. § 115B.02.

Minnesota Pollution Control Agency ("MPCA") to be a "responsible person" within the meaning of the state's hazardous waste clean-up law.[2] *See In re Westling Mfg., Inc.*, 442 N.W.2d 328 (Minn.App.1989). Westling Manufacturing Company has spent more than $1,085,626 to date to investigate, monitor and cure the contamination, pursuant to a

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Subject to various defenses, MERLA imposes strict, joint and several liability on certain persons responsible for costs incurred to identify and remedy a release (or threatened release) of a hazardous substance, pollutant or contaminant from any facility. Minn.Stat. § 115B.04, subd. 1.

MERLA establishes procedures by which the Minnesota Pollution Control Agency ("MPCA") can take actions to protect the public health or welfare or the environment from a release or threatened release of hazardous substances or pollutants or contaminants. Minn.Stat. § 115B.17. MERLA permits the MPCA to bring actions against responsible persons to compel performance of response actions, or (under certain conditions) to proceed with remedial action and recover the costs of remediation from one or more responsible parties. *Id.*

The MPCA has established a permanent list of priorities among releases or threatened releases of hazardous substances, for the purpose of taking remedial action. *See* Minn.Stat. § 115B.17, subd. 13. Properties are placed on the list based on criteria such as the relative risk or danger to public health, the potential for contamination of drinking water supplies, and the potential for direct human contact. *Id.*

[2] A responsible person, for purposes of the present case, includes a person who owned or operated a facility when (a) the hazardous substance was placed in or on the facility; (b) when the hazardous substance was located in or on the facility but before the release; or (c) during the time of the release or threatened release. Minn.Stat. § 115B.03, subd. 1. A responsible person is strictly liable, jointly and severally, for response costs and damages resulting from a release or threatened release, or to which the release significantly contributes. Minn.Stat. § 115B.04, subd. 1. Westling purchased the second parcel of land in 1989 knowing it was contaminated. Westling was named as a responsible party because he and his wife owned the property and as president of Westling Manufacturing, he knowingly permitted the company to use a hazardous substance. *See* Minn.Stat. § 115B.03, subds. 1, 3.

"response plan" approved by the MPCA.[3] The future cost of cleanup is estimated at approximately $3,581,000.

The Westlings have been before this court on three prior occasions challenging the assessed value of the subject property, claiming that the presence of environmental contamination reduced its market value. *See Westling v. County of Mille Lacs*, 543 N.W.2d 91 (Minn.1996) ("Westling III"); *Westling v. County of Mille Lacs*, 531 N.W.2d 848 (Minn.1995) (affirming tax court decision without published opinion) ("Westling II"); *Westling v. County of Mille Lacs*, 512 N.W.2d 863 (Minn.1994) ("Westling I"). In *Westling I*, we reversed the tax court's determination that the property had only a nominal value of $100 because it was "unmarketable," *Westling I*, 512 N.W.2d at 866. We remanded to the tax court for a valuation determination based on traditional appraisal techniques, holding that "[such] techniques, appropriately modified to account for the effects of environmental contamination, are adequate for determining a property's market value" for tax purposes. *Id.* In *Westling III*, we affirmed the decision of the tax court that the Mille Lacs county assessor's estimated market value of the property should be reduced to $0, based on the estimated cost of cleaning up the property and the stigma discount for the environmental damage. *Westling III*, 543 N.W.2d at 93.

In 1993, the Minnesota legislature enacted a new "contamination tax," effective beginning with 1994 taxes, payable in 1995. Act of May 24, 1993, ch. 375, art. 12, 1993 Minn. Laws 2728, 2941-49 *codified as amended* at Minn.Stat. §§ 270.91-.98 (1996). This act imposes an annual tax on the

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[3] A "response plan" is a plan for cleanup or remediation of polluted property that has been approved by the MPCA or Department of Agriculture under Minn.Stat. § 469.174, subd. 17; Minn.Stat. ch. 18D; or Minn.Stat. ch. 115B. *See* Minn.Stat. § 270.92, subd. 6. Such a plan has been approved for the subject property.

"contamination value" of taxable real property in Minnesota. Minn.Stat. § 270.91, subd. 1. "Contamination value" is "the amount of the market value reduction, if any, that is granted for general *ad valorem* property tax purposes for the assessment year because of the presence of contaminants." Minn.Stat. § 270.93. The tax applies if the reduction in value was granted by a court, a board of review, or by the county assessor, but is not imposed if the reduction in market value is less than $10,000. *Id.* In no case may the "contamination value" of a property be greater than the estimated cost of implementing a reasonable response plan. *Id.*

The tax is calculated by multiplying the "contamination value" by the property's class rate for *ad valorem* property tax, multiplied by another factor that varies according to certain characteristics of the property and the property owner. The variable factor depends upon whether the owner or operator of the property was legally responsible for the contamination and whether the MPCA has approved a response plan for cleanup of the property under Minn.Stat. ch. 18D (1996) or 115B (1996), and work has begun on the response plan. The chart immediately following illustrates the four variable factors imposed under the act. *See* Minn.Stat. § 270.91.

| CLEANUP STATUS | OWNER OR OPERATOR A RESPONSIBLE PARTY | OWNER OR OPERATOR NOT A RESPONSIBLE |
|---|---|---|
| APPROVED RESPONSE PLAN UNDERTAKEN | 50% | 12.5% |
| NO RESPONSE PLAN OR NO CLEANUP DONE | 100% | 25% |

The contamination tax is payable at the same time and in the same manner as the regular *ad valorem* property tax, and is subject to the same penalty, interest, lien, and forfeiture provisions.[4] Minn.Stat. § 270.95. The tax is discontinued when the taxpayer provides the assessor with a written determination by the MPCA stating that all of the requirements of the response plan have been satisfied. Minn.Stat. § 270.94.

Because the Westlings are a "responsible party" with an "approved response plan," their property is taxed at 50% of the tax rate for the applicable property class, class 3a, industrial property. Minn.Stat. § 273.13, subd. 24 (1996). The Mille Lacs County assessor determined "contamination values" for the subject property of $1,003,400 as of January 2, 1994, and $1,600,000 as of January 2, 1995, and imposed contamination taxes on the property in the amount of $22,278.50 for 1994, payable in 1995, and $36,000 for 1995, payable in 1996.[5] The Westlings appealed the assessed tax to the tax court, contending that the tax violates the United States Constitution and the Minnesota Constitution. The tax court held that: (1) the contamination tax did not discriminate against certain properties in the same class, in violation of

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[4] If a response plan has not been implemented for the affected property, the county treasurer forwards 100% of the monies collected from the contamination tax to the local taxing district when the real property taxes are distributed. Minn.Stat. § 270.96, subd. 3(b). When work has begun on an approved response plan, the county may retain 5% of contamination tax revenues as compensation for administering the tax, and must forward the remaining 95% to the commissioner of revenue for deposit in the contaminated site cleanup and development account, revenues which assist the state in cleaning up environmentally contaminated sites. Minn.Stat. § 270.96, subd. 3(a).

[5] The Westlings do not contest the assessor's factual determination of either the contamination value or the contamination tax for the subject property.

article X, § 1 of the Minnesota Constitution and the Fourteenth Amendment to the United States Constitution; (2) the contamination tax was not a governmental taking in violation of article I, § 13 of the Minnesota Constitution and the Fifth Amendment to the United States Constitution; and (3) the imposition of the contamination tax on the subject property was constitutional as applied. The same issues are now before us.

The constitutionality of a statute is a question of law, and this court owes no deference to a lower court's conclusions. *In re Blilie*, 494 N.W.2d 877, 881 (Minn.1993). Statutes are presumed to be constitutional, and the judicial power to declare a statute unconstitutional should be exercised "with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn.1989). The party challenging the constitutionality of the statute bears the burden of establishing "beyond a reasonable doubt" that the statute violates a constitutional right. *In re Conservatorship of Foster*, 547 N.W.2d 81, 85 (Minn.1996). The same deference is applicable to a taxation statute as to other legislation. *Contos v. Herbst*, 278 N.W.2d 732, 736 (Minn.1979).

The Westlings argue, first, that imposition of the contamination tax violates the uniformity clause of the Minnesota Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution. The "uniformity clause" of the Minnesota Constitution states that "[t]axes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes * * *." Minn. Const. Art. X, § 1. It is established in Minnesota that the uniformity provision of the state constitution is no more restrictive upon the legislature's power to tax or classify than is the equal protection clause in the Fourteenth Amendment to the United States Constitution. *Kuiters v. County of Freeborn*, 430 N.W.2d 461, 463 (Minn.1988). The same test is used for both analyses. *Brainerd Area Civic Ctr. v.*

*Commissioner of Revenue*, 499 N.W.2d 468, 472 (Minn.1993).

In order to prevail on a facial challenge to a statute on equal protection grounds, a taxpayer must prove, beyond a reasonable doubt, "that at least two classes are created by the statute, that the classes are treated differently under the statute, and that the difference in treatment cannot be justified." *In re McCannel*, 301 N.W.2d 910, 916 (Minn.1980). The Westlings argue that this principle is violated because the contamination tax statute results in properties within the same property class being taxed at "hundreds of different tax rates," through the application of the four variable factors. In essence, the Westlings assert that property within an *ad valorem* property tax classification cannot be further classified.

The test for the constitutionality of statutory classifications was enunciated by this court in *Miller Brewing Co. v. State*, 284 N.W.2d 353 (Minn.1979).

> The test consists of three prongs: (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; (3) the purpose of the statute must be one that the state can legitimately attempt to achieve. *Miller Brewing*, 284 N.W.2d at 356.

The first prong of the *Miller Brewing* test requires us to determine whether there is a legitimate basis for establishing

a separate classification of taxable property. It is well-settled that the legislature has broad freedom to classify as to the subject-matter of taxation as long as there is a reasonable ground for making a distinction and if the classification has a reasonable relation to the purpose of taxation. *Montgomery Ward & Co. v. Commissioner of Taxation*, 216 Minn. 307, 310, 12 N.W.2d 625, 627 (1943). However, a tax rate must operate without discrimination upon all property within a classification. *Apartment Operators' Ass'n v. City of Minneapolis*, 191 Minn. 365, 369, 254 N.W. 443, 445 (1934). Additionally, the classification must not be unreasonable, arbitrary or capricious. *Apartment Operators*, 191 Minn. at 366, 254 N.W. at 444. Legislative classifications not based on a suspect class nor affecting fundamental interests (as these have been defined by the United States Supreme Court) must be upheld under equal protection and uniformity clause analysis unless there is no reasonable basis for the classification. *McCannel*, 301 N.W.2d at 917. Inasmuch as there is no fundamental interest at issue here, we look first to whether the classification at issue here is "genuine and substantial," rather than "manifestly arbitrary or fanciful."[6]

In the context of examining the reasonableness of a statutory classification, this court has stated that:

> [t]he classification must be based on differences furnishing a reasonable ground for distinction between the several classes. In classifying property

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[6] Although the relators assert that the contamination tax infringes on a fundamental interest, namely, "the interest that taxpayers have under Minnesota and United States Constitutions in having their taxes based on actual value," that argument is without merit. In *Contos*, 278 N.W.2d at 740, this court held that the "wide-open tax amendment" of 1906 eliminated the requirement that all property be taxed on the basis of actual value. Contrary to relators' assertions, we find no fundamental right in either the United States or Minnesota Constitution that the legislative classification must be absolutely related to cash value.

> for the purpose of taxation, the Legislature is determining a matter of state policy and is not tied down to any narrow or technical rule.

*Apartment Operators*, 191 Minn. at 367, 254 N.W. at 444 (citation omitted). We think this case is akin to *Minnegasco, Inc. v. County of Carver*, 447 N.W.2d 878 (1989), which involved a claim by the utility that statutory inclusion of its personal property in property Class 3a and Class 4 violated the uniformity requirements of the U.S. and Minnesota Constitutions. Rejecting that argument, we said that the legislature's scheme was essentially a "class within a class," designed to recognize the "unique character" of the property at issue. *Id.* at 881. In the present case, the property at issue also has a "unique character," viz., its contaminated, hazardous state. Here the legislature has chosen three different criteria for including some property within the tax and excluding others. The first and primary distinction is that the tax applies only to property that has been reduced in assessed value due to the presence of environmental contamination. The second criterion is whether the taxpayer has been determined by the MPCA to be a responsible party. Third, a distinction is made based upon whether an approved response plan has been implemented for the property in question.

These are not arbitrary or fanciful distinctions, but are based on a recognition that contaminated property diminishes the *ad valorem* property tax base relied upon by local taxing authorities. In addition, the presence of contaminated property in a community may result in increased health risks, in decreased valuations for nearby properties, and in abandonment or underutilization of property, thereby contributing to community blight and economic distress. Contaminated property thereby poses a greater burden on society than uncontaminated property. Further, the long term magnitude of that burden will vary, depending on whether

there is a "responsible party" implementing an approved "response plan." Therefore, we conclude that the presence of environmental contamination, along with the extent of responsibility for clean up, are genuine and rational bases that the legislature may use to create the "class within a class" represented by the contamination tax.

The second prong of the *Miller Brewing* test considers whether the classification scheme is reasonably related to the purpose of the statute. The tax court, while acknowledging that the bill nowhere states the legislature's purpose, found that "it is reasonable to assume that the legislature intended to discourage environmental contamination, encourage the abatement of pollution and offset the costs of environmental regulation enforcement when it enacted the Contamination Tax."

Although the purpose of the enactment is not stated on its face, this court has previously declared that "[i]n equal protection analysis, [any] conceivable and legitimate reason for the legislative classification may provide the rational basis to satisfy the constitutional requirement of equality and uniformity for tax legislation." *Brainerd Area Civic Ctr.*, 499 N.W.2d at 472. In operation, the contamination tax recaptures revenue lost to counties that continue to provide services to affected properties, even though property taxes have been reduced due to the presence of contamination. It requires property owners who benefit from government services to pay for some of the costs of providing those services. The tax also acts as an incentive to property owners to clean up affected properties, since the implementation of an approved response plan for cleanup reduces by 50% the contamination tax otherwise imposed. *See* Minn.Stat. § 270.91. When work has begun on an approved response plan, the revenues generated by the contamination tax are deposited in the contaminated site cleanup and development account, thereby providing additional revenue to assist the state in cleaning up contaminated sites. Minn.Stat. §§ 270.96, subd.

3(a); 270.97. Additionally, the statute encourages responsible behavior by owners of uncontaminated property by substantially reducing the contamination tax obligation if the owner or operator is not responsible for the contamination.

It is reasonable to assume that the legislature enacted the contamination tax for the purposes of raising revenue, of strengthening the local tax base, of encouraging environmentally responsible behavior by owners and operators of property, and of encouraging cleanup of environmentally contaminated property. These are legitimate public purposes that the legislature may have intended to achieve by enactment of the contamination tax.

The second prong under equal protection and uniformity analysis also requires that the classification used by the legislature be rationally related to the legislature's objectives. Given the possible objectives we have listed above, and the deferential standard of our review, we conclude that the classifications identified in the statute are rationally related to the legislature's objectives in enacting the tax. Even if the classification scheme is imperfectly related to the legislature's objectives, imperfection is not a constitutional defect. It is only necessary that the classification be rationally related to the purpose. The wisdom and social effects of a statute lie within the secure domain of the legislature:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

*McCannel*, 301 N.W.2d at 918-19 (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979)). Furthermore, the legislature is not confined to a single remedy or means of accomplishing legitimate governmental purposes. Such social policy decisions are committed to the legislature, and we conclude that the classifications used by the legislature in enacting the contamination tax are rationally related to the purposes effected by the statute.

The third prong of the *Miller Brewing* test requires us to determine whether the purpose of the statute is one that the state can legitimately attempt to achieve. Under this prong, the legislature is afforded the widest possible latitude. This court has previously recognized that "*any* legitimate purpose can support [a] tax." *Erie Mining Co. v. Commissioner of Revenue*, 343 N.W.2d 261, 268 (Minn.1984) (emphasis in original). Since the constitution grants the legislature the power of classification, the only limitation on that power, according to the United States Supreme Court, is that the power "must not be exercised in 'clear and hostile discriminations between particular persons and classes.'" *Citizens' Tel. Co. v. Fuller*, 229 U.S. 322, 331, 33 S.Ct. 833, 57 L.Ed. 1206 (1913). Thus, unless it appears that the underlying purpose is invidious or arbitrary, the governmental purpose will be upheld. It is beyond question that the generation of revenue and the clean-up of environmental contamination are legitimate government purposes. Thus, we conclude, that the relators have not carried their burden of proving beyond a reasonable doubt that the "contamination tax," embodied in Minn.Stat. §§ 270.91-.98, violates either the uniformity clause of the Minnesota Constitution or the equal protection clause of the United States Constitution.

Relators' second argument, that the imposition of a contamination tax in excess of the value of their property constitutes a governmental taking without compensation, is also without merit. Relators argue that the subject property has no market value at all; therefore any tax at all imposed on

the property is in excess of 100% of the property's value and therefore constitutes a confiscatory tax. The takings clause of the Fifth Amendment to the United States Constitution provides that no person "shall be * * * deprived of life, liberty, or property, without due process of law." Article 1, § 13 of the Minnesota Constitution provides that "[p]rivate property shall not be taken * * * for public use without just compensation therefor, first paid or secured." The purpose underlying these provisions is to ensure that the government does not require "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 552 (Minn.1996) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)). In this case, there has been no *per se* taking of the subject property; the Westlings do not allege that there has been an actual taking of title or permanent physical invasion of the subject property. Nor do the Westlings claim that they have been deprived of all economically beneficial or productive use of their property. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Thus the taking, if any, falls into the realm of economic regulation, by imposing a tax theoretically in excess of the property's value.

At the heart of the law concerning regulatory taking lies the notion that a constructive taking occurs when the state, in the exercise of its police power, goes "too far" in its regulation, so as to unfairly diminish the value of the individual's property, thus causing the individual to bear the burden rightly borne by the public. *Zeman*, 552 N.W.2d at 552. Generally, the determination of whether a taking has occurred is highly fact-specific, depending on the particular circumstances underlying each case. *Id.* (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)). In deciding whether a particular governmental action has effected a taking, the

United States Supreme Court has also stated that a court must look both at the "character of the action" and at the "nature and extent of the interference with rights in the parcel as a whole." *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. 2646.

The Supreme Court was faced with the argument that a tax was so confiscatory as to be unconstitutional in *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974). In *Alco Parking*, the Pennsylvania Supreme Court had invalidated a Pittsburgh city ordinance that imposed a 20% tax on gross receipts from private operators of nonresidential parking places. *Id.* at 370, 94 S.Ct. 2291. In the opinion of the state supreme court, the tax was an uncompensated taking because it was "unreasonably high" and had caused nine of the 14 private parking lot operators to operate their parking facilities at a loss or only marginal profit. *Id.* at 372, 94 S.Ct. 2291. The United States Supreme Court reversed, stating that

> [t]he claim that a particular tax is so unreasonably high and unduly burdensome as to deny due process is both familiar and recurring, but the Court has consistently refused either to undertake the task of passing on the 'reasonableness' of a tax that otherwise is within the power of Congress or of state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable.

*Id.* at 373, 94 S.Ct. 2291. Specifically, the Court went on to say that "[t]he premise that a tax is invalid if so excessive as to bring about the destruction of a particular business * * * ha[s] been 'uniformly rejected as furnishing no juridical ground for striking down a taxing act.'" *Id.* at 374, 94 S.Ct. 2291 (quoting *Magnano Co. v. Hamilton*, 292 U.S. 40, 47, 54 S.Ct. 599, 78 L.Ed. 1109 (1934)).

In *Penn Central*, the Court identified several factors that are particularly significant to making the factual inquiry into whether a particular government act is a regulatory taking. *Penn Central*, 438 U.S. at 124-27, 98 S.Ct. 2646. In that context, the Court observed that the taxing power is an "obvious example" of a government action that, although having adverse economic consequences on individuals, is a power necessary to the existence of government. *Id.* at 124, 98 S.Ct. 2646. Thus, we conclude that neither the Fifth Amendment to the United States Constitution nor Article 1, § 13 of the Minnesota Constitution limits the power of the legislature to impose an otherwise valid tax.

We conclude, therefore, that the contamination tax, Minn.Stat. §§ 270.91- .98, does not violate the United States Constitution or the Minnesota Constitution.

Affirmed.

John W. WESTLING and Sharolyn Westling, husband and wife, Petitioners,

v.

COUNTY OF MILLE LACS, Respondent.

John W. WESTLING, Petitioner,

v.

COUNTY OF MILLE LACS, Respondent.
Nos. C1-96-264, C2-95-327, C3-96-265.
Minnesota Tax Court.
Feb. 19, 1997.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

This matter was submitted to the Honorable Kathleen Doar, Chief Judge of the Minnesota Tax Court, upon a Stipulation of Facts.
William L. Lucas, Attorney at Law, represented the Petitioners.
John H. Wenker, Assistant Mille Lacs County Attorney, appeared for the Respondent.

KATHLEEN DOAR, Chief Judge.

The issue in this case is whether Minn.Stat. §§ 270.91 through 270.98 (the "Contamination Tax") violate Article I § 13 and Article X § 1 of the Minnesota Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

Post-trial briefs were filed by both parties and the matter was submitted to the Court for decision on November 27, 1996.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

## FINDINGS OF FACT

1. Petitioners have sufficient interest in the property to maintain this petition; all statutory and jurisdictional requirements have been complied with, and the Court has jurisdiction over the subject matter of the action and the parties hereto.

2. The subject property consists of two contiguous parcels, 13.06 acres in total size, located near Highway 169 in Princeton, Minnesota, P.I.D. Nos. 24-032-2501 (the "Five Acre Parcel") and 24-033-0410 (the "Eight Acre Parcel") (the "Subject Property").

3. Petitioners purchased the Five Acre Parcel in 1987 from John Westling's father and improved it with a 22,574 square foot office warehouse. In 1989 the Westlings purchased the Eight Acre Parcel from Mr. Westling's father. The Eight Acre Parcel is improved with a 66,290 square foot office warehouse building constructed in 1971. The building constructed on the Five Acre Parcel abuts and is connected to the building on the Eight Acre Parcel.

4. Westling Manufacturing Company, which remanufactures automotive parts, leases the Subject Property for $114,000 per year.

5. The Subject Property is contaminated by tetrachloroethene, a volatile organic compound.

6. The Subject Property is listed by the Minnesota Pollution Control Agency (the "MPCA") on the State Superfund List of Priorities. The MPCA has named John Westling as a responsible party.

7. The Subject Property had a negative market value on the January 2, 1994 and January 2, 1995 assessment dates.

8. The Mille Lacs County Assessor placed contamination values of $1,003,400 as of January 2, 1994 and $1,600,000 as of January 2, 1995 on the Subject Property and has imposed a tax of $22,278.50 for 1994 and $36,000 for 1995.

9. Petitioners challenge the constitutionality of the tax imposed.

## CONCLUSIONS OF LAW

1. The Contamination Tax does not violate the Minnesota or United States Constitutions.

2. The assessor's estimate of contamination values for the Subject Property for 1994 and 1995 are affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY. THIS IS A FINAL ORDER. A STAY OF 15 DAYS IS HEREBY ORDERED.

BY THE COURT

/s/ Kathleen Doar
Kathleen Doar, Chief Judge
MINNESOTA TAX COURT

DATED: February 19, 1997

## MEMORANDUM

This is the third time John and Sharolyn Westling have appeared before us. First, the Westlings challenged the Subject Property's January 2, 1991 estimated market value. We reduced the January 2, 1991 value to a nominal amount because the property was contaminated. Westling v. County of Mille Lacs, File Nos. C5-92-341 and C7-92-342 (Minn. Tax Ct. Feb. 10, 1993). On appeal the Minnesota Supreme Court remanded the case. Westling v. County of Mille Lacs, 512 N.W.2d 863 (Minn.1994). On remand we accepted the opinion of the only witness who used modified traditional appraisal techniques and found a January 2, 1991 value of $880,000. Westling v. County of Mille Lacs, File Nos. C5-92-341 and C7-92-342 (Minn. Tax Ct. Order dated May 27, 1994) aff'd without opinion, File No. C7-94-1740 (Minn. Apr. 24, 1995).

Second, the Westlings challenged the January 2, 1992 and January 2, 1993 market values for the Subject Property. We accepted the opinion of one of the expert witnesses who testified that the property had a negative market value because it was contaminated and reduced the 1992 and 1993 market values to $0. Westling v. County of Mille Lacs, File Nos. C4-93-504, C5-93-706, C2-94- 379, C9-94-380 (Minn. Tax Ct. Mar. 17, 1995). The Minnesota Supreme Court affirmed our decision. See Westling v. County of Mille Lacs, 543 N.W.2d 91 (Minn.1996).

The Westlings now challenge the constitutionality of the tax assessed against the Subject Property in 1994 and 1995 pursuant to Minn.Stat. §§ 270.91 to 270.98 (the "Contamination Tax"). The Contamination Tax was enacted by the legislature shortly after we issued our first decision in the spring of 1993. 1993 Minn. Laws, ch. 375, art. 12, §§ 1-8. The Westlings make two claims: (1) the Contamination Tax discriminates against members of the same class in violation of Article X § 1 of the Minnesota Constitution and the

Fourteenth Amendment to the United States Constitution; and (2) the Contamination Tax is a confiscatory tax which violates Article I § 13 of the Minnesota Constitution and the Fifth Amendment to the United States Constitution.

I. The Statute.

The Contamination Tax imposes a tax upon the "contamination value" of taxable real property in the state. Minn.Stat. § 270.91, subd. 1. In general terms the "contamination value" of a property is the reduction in market value suffered by the property because it is contaminated. Minn.Stat. § 270.93. The law provides that a property's contamination value is taxed at one of four rates depending upon the responsibility of the owner/operator for the contamination and the existence of an approved response action plan.[1] Minn.Stat. § 270.91, subds. 2-4. The tax is payable at the same time and in the same manner as the ad valorem property tax. Minn.Stat. § 270.95.

II. The Assessment.

The Mille Lacs County Assessor determined that the Subject Property had a contamination value of $1,003,400 on January 2, 1994 and $1,600,000 on January 2, 1995. He therefore assessed the tax at issue. The Westlings do not challenge the contamination values or the contamination rates

[1] If the owner/operator is responsible for the contamination and there is no response action plan, the rate of tax is 100% of the class rate for the property under Minn.Stat. § 273.13; if a response action plan has been approved the rate is 50% of the Minn.Stat. § 273.13 class rate. If the owner/operator is not responsible for the contamination and no response action plan exists the rate is 25% of the Minn.Stat. § 273.13 class rate; if an approved plan exists the rate is 12.5% of the Minn.Stat. § 273.13 class rate.

used by the assessor; they challenge the constitutionality of the law itself.

III. Uniformity and Equal Protection.

Article X § 1 of the Minnesota Constitution provides that "taxes shall be uniform upon the same class of subjects" (the "Uniformity Clause"). The Fourteenth Amendment to the United States Constitution provides "nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws" (the "Equal Protection Clause"). The Westlings argue that the Contamination Tax imposes different rates of tax upon the same class of property in violation of the Uniformity Clause and the Equal Protection Clause.

We follow two guiding principals: (1) "Where a party challenges a statute as unconstitutional, this court [the Minnesota Supreme Court] will not strike down the statute unless 'the party challenging it demonstrates beyond a reasonable doubt that the statute violates some constitutional provision'." Lund v. County of Hennepin, 403 N.W.2d 617, 619 (Minn.1987) quoting Miller Brewing Co. v. State, 284 N.W.2d 353, 356 (Minn.1979); and (2) The Uniformity Clause is no more restrictive upon the state's legislative power to tax and classify than the Equal Protection Clause. Lund, 403 N.W.2d at 619.

The Westlings argue that the Contamination Tax imposes varying rates of tax upon a single class of property, in this case commercial/industrial property. We find, however, that the Contamination Tax creates four new classes of property; it does not treat members of the same class of property unequally. See Matter of McCannel, 301 N.W.2d 910, 916 (Minn.1980). The four new classes are:

> (1) contaminated property whose owner/operator is responsible for the

contamination with no response action plan in place;

(2) contaminated property whose owner/operator is responsible for the contamination with an approved response action plan in place;

(3) contaminated property whose owner/operator is not responsible for the contamination with no response action plan in place; and

(4) contaminated property whose owner/operator is not responsible for the contamination with an approved response action plan in place.

The issue is: Are these statutory classifications constitutional?

The test used to determine the constitutionality of statutory classifications is as follows:

(1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs;

(2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy;

> (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Miller Brewing Co., 284 N.W.2d at 356.

The United States Supreme Court has said: "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes...." San Antonio School District v. Rodriguez, 411 U.S. 1, 41, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (quoting Madden v. Kentucky, 309 U.S. 83, 88, 60 S.Ct. 406, 84 L.Ed. 590 (1940)). Many types of classifications and distinctions have been upheld as valid under the Equal Protection Clause. See Lund (upholding graduated assessment rates for homestead property); Erie Mining Co. v. Commissioner of Revenue, 343 N.W.2d 261 (Minn.1984) (upholding taconite tax classification scheme); Nordlinger v. Hahn, 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (upholding property tax classifications based upon length of time property owned by taxpayer).

Clearly, the Minnesota legislature has a legitimate interest in a clean environment. While not explicitly stated, it is reasonable to assume that the legislature intended to discourage environmental contamination, encourage the abatement of pollution and offset the costs of environmental regulation enforcement when it enacted the Contamination Tax. The distinctions between the classes created by the Contamination Tax, responsibility and the existence of a response action plan, are genuine and rationally related to these purposes. It is reasonable to tax the class of owner/operators who are responsible for the contamination and have made no attempts to cure the problem at a higher rate than the other contamination classes. We find that the Contamination Tax survives the Westlings' Uniformity Clause and Equal Protection Clause challenge.

IV. Confiscatory Taking.

Article I § 13 of the Minnesota Constitution provides: "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor...." The Fifth Amendment to the United States Constitution provides in part: "No person shall ... be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

The Westlings argue that the Contamination Tax assessed against the Subject Property is an infinite rate of tax because the property has a market value of $0 or less than $0 (i.e. a negative value). They therefore argue the "tax" is a taking of property without just compensation. The Westlings cite no decisions which support their argument and acknowledge that the Minnesota Supreme Court has never found a tax an unconstitutional taking.

The Westlings have failed to show beyond a reasonable doubt that the Contamination Tax is an unconstitutional taking. As noted above, the Contamination Tax is rationally related to a public purpose. It is not unreasonable, arbitrary or capricious. We therefore find that it does not violate Article I § 13 of the Minnesota Constitution or the Fifth Amendment to the United States Constitution and we affirm the 1994 and 1995 tax as assessed. See also, Contos v. Herbst, 278 N.W.2d 732 (Minn.1979); Sisson v. Triplett, 428 N.W.2d 565 (Minn.1988).

K.D.

STATE OF MINNESOTA

Supreme Court

John W. Westling et al.,

Relators,

JUDGMENT
C3-97-812

vs.

County of Mille Lacs,

Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the decision of the Minnesota Tax Court filed March 12, 1996, be and the same hereby is affirmed. and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is hereby transmitted and made part of the remittitur.

Date and signed: FOR THE COURT August 17, 1998,

by /s/ Wendy Johnson
Assistant Clerk.

## SECTION 1. OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION

Amendment XIV.

Section 1. Citizenship Rights Not to Be Abridged by States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## ARTICLE X, § 1. OF THE MINNESOTA CONSTITUTION

Sec. 1. Power of taxation; exemptions; legislative powers.

The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes, but public burying grounds, public school houses, public hospitals, academies, colleges, universities, all seminaries of learning, all churches, church property, houses of worship, institutions of purely public charity, and public property used exclusively for any public purpose, shall be exempt from taxation except as provided in this section. There may be exempted from taxation personal property not exceeding in value $200 for each household, individual or head of a family, and household goods and farm machinery as the legislature determines. The legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefited thereby without regard to cash valuation. The legislature by law may define or limit the property exempt under this section other than churches, houses of worship, and property solely used for educational purposes by academies, colleges, universities and seminaries of learning.

THE STATE OF MINNESOTA
CONTAMINATION TAX STATUTE
MINN. STAT. §§ 270.91 - 270.98

270.91. Contamination tax.
270.92. Definitions.
270.93. Tax base; contamination value.
270.94. Exemptions.
270.95. Payment; administration.
270.96. Duties.
270.97. Deposit of revenues.
270.98. Local administrative costs.

CONTAMINATION TAX

270.91. Contamination tax.

Subdivision 1. Imposition. A tax is annually imposed on the contamination value of taxable real property in this state.

Subd. 2. Initial tax rates. Unless the rates under subdivision 3 or 4 apply, the tax imposed under this section equals 100 percent of the class rate for the property under section 273.13, multiplied by the contamination value of the property.

Subd. 3. Tax rates, nonresponsible party. If neither the owner nor the operator of the taxable real property, in the assessment year, is a responsible person under chapter 115B or a responsible party under chapter 18D for the presence of contaminants on the property, unless subdivision 4 applies, the tax imposed under this section equals 25 percent of the class rate for the property under section 273.13, multiplied by the contamination value of the property. A determination under section 115B.177 or other similar determination by the commissioner of the pollution control agency or by the commissioner of agriculture for a release of agricultural

chemicals is dispositive of whether the owner or operator is not a responsible person under chapter 18D or 115B for purposes of this section. To qualify under this subdivision, the property owner must provide the assessor with a copy of the determination by July 1 of the assessment year.

Subd. 4. Tax rates after plan approval.

(a) The tax imposed under this subdivision applies for the first assessment year that begins after one of the following occurs:

(1) a response action plan for the property has been approved by the commissioner of the pollution control agency or by the commissioner of agriculture for an agricultural chemical release or incident subject to chapter 18D and work under the plan has begun; or

(2) the contaminants are asbestos and the property owner has in place an abatement plan for enclosure, removal, or encapsulation of the asbestos. To qualify under this clause, the property owner must (i) have entered into a binding contract with a licensed contractor for completion of the work, or (ii) have obtained a license from the commissioner of health and begun the work. An abatement plan must provide for completion of the work within a reasonable time period, as determined by the assessors.

(b) To qualify under paragraph (a), the property owner must provide the assessor with a copy of:

(1) the approved response action plan; or

(2) a copy of the asbestos abatement plan and contract for completion of the work or the owner's license to perform the work. The property owner also must file with the assessor an affidavit indicating when work under the response action plan or asbestos abatement plan began.

(c) The tax imposed under this subdivision equals 50 percent of the class rate for the property under section 273.13, multiplied by the contamination value of the property, unless paragraph (d) applies.

(d) The tax imposed under this subdivision equals 12.5 percent of the class rate for the property under section 273.13, multiplied by the contamination value of the property, if one of the following conditions is satisfied:

(1) the contaminants are subject to chapter 115B and neither the owner nor the operator of the taxable real property in the assessment year is a responsible person under chapter 115B;

(2) the contaminants are subject to chapter 18D and neither the owner nor the operator of the taxable real property in the assessment year is a responsible party under chapter 18D.

270.92. Definitions.

Subdivision 1. Scope of application. For purposes of sections 270.91 to 270.98, the following terms have the meanings given.

Subd. 2. Assessment year. "Assessment year" means the assessment year for purposes of general ad valorem property taxes.

Subd. 3. Contaminant. "Contaminant" means a harmful substance as defined in section 115B.25, subdivision 7a.

Subd. 4. Contaminated market value. "Contaminated market value" is the amount determined under section 270.93.

Subd. 5. Presence of contaminants. "Presence of contaminants" includes the release or threatened release, as defined in section 115B.02, subdivision 15, of contaminants on the property.

Subd. 6. Response plan. "Response plan" means:

(1) a development action response plan, as defined in section 469.174, subdivision 17;

(2) a response action plan under chapter 115B or a corrective action plan under chapter 18D;

(3) a plan for corrective action approved by the commissioner of agriculture under section 18D.105; or

(4) a plan for corrective action approved by the commissioner of the pollution control agency under section 115C.03.

270.93. Tax base; contamination value.

The contamination value of a parcel of property is the amount of the market value reduction, if any, that is granted for general ad valorem property tax purposes for the assessment year because of the presence of contaminants. The contamination value for a property may be no greater than the estimated cost of implementing a reasonable response action plan or asbestos abatement plan or management program for the property. These reductions in market value include those granted by a court, by a board of review, by the assessor upon petition or request of a property owner, or by the assessor. Reductions granted by the assessor are included only if the assessor reduced the property's market value for the presence of contaminants using an appraisal method or methods that are specifically designed or intended to adjust for the valuation effects of the presence of contaminants. The contamination value for a parcel with a reduction in value of less than $ 10,000 is zero.

270.94. Exemptions.

(a) The tax imposed by sections 270.91 to 270.98 does not apply to the contamination value of a parcel of property attributable to contaminants that were addressed by a response action plan for the property, if the commissioner of

the pollution control agency, or the commissioner of agriculture for a release subject to chapter 18D, has determined that all the requirements of the plan have been satisfied. This exemption applies beginning for the first assessment year after the commissioner of the pollution control agency, or the commissioner of agriculture determines that the implementation of a response action plan has been completed. To qualify under this paragraph, the property owner must provide the assessor with a copy of the determination by the commissioner of the pollution control agency or the commissioner of agriculture of the completion of the response action plan.

(b) The tax imposed by sections 270.91 to 270.98 does not apply to the contamination value of a parcel that is attributable to asbestos, if:

(1) the work has been completed under an asbestos abatement plan or the property owner is implementing a proactive in-place asbestos management program consistent with the rules, requirements, and formal policies of the United States Environmental Protection Agency; and

(2) the property owner provides the assessor with an affidavit stating the work under the abatement plan has been completed, or the asbestos management plan is being implemented, and any other evidence or information the assessor requests.

270.95. Payment; administration.

The tax imposed under sections 270.91 to 270.98 is payable at the same time and manner as the regular ad valorem property tax. The tax is subject to the penalty, interest, lien, forfeiture, and any other rules for collection of the regular ad valorem property tax. If a reduction in market value that creates contamination value is granted after the ad valorem property tax has been paid, the contamination tax must be subtracted from the amount to be refunded to the property owner.

270.96. Duties.

Subdivision 1. Assessors. Each assessor shall notify the county auditor of the contamination value under section 270.91 by the separate tax rate categories under subdivisions 2, 3, and 4 for each parcel of property within the assessor's jurisdiction. The assessor shall provide notice of the contamination value to the property owner by the later of June 1 of the assessment year or 30 days after the reduction in market value is finally granted.

Subd. 2. Auditor. The county auditor shall prepare separate lists of the contamination values for all property located in the county that are taxed under section 270.91, subdivisions 2, 3, and 4. The commissioner shall prescribe the form of the listing. The auditor shall include the amount of the contamination taxes on the contamination value for the assessment year on the regular ad valorem property tax statement under section 276.04.

Subd. 3. Treasurer.

(a) The county treasurer shall pay the proceeds of the tax imposed under section 270.91, subdivision 4, less the amount retained by the county for the cost of administration under section 270.98, to the commissioner at the same times provided for the ad valorem property tax distributions.

(b) The county treasurer shall pay the proceeds of the tax imposed under section 270.91, subdivisions 2 and 3, to the local taxing jurisdictions in the same manner provided for the distribution of ad valorem property taxes.

Subd. 4. Court ordered reductions in value. If a court orders a reduction in market value for purposes of the ad valorem property tax because of the presence of contaminants on the property, the court shall include in its order an offset for

payment of the tax on contaminated value under section 270.91.

270.97. Deposit of revenues.

The commissioner shall deposit all revenues derived from the tax, interest, and penalties received from the county in the contaminated site cleanup and development account in the general fund.

270.98. Local administrative costs.

The county may retain five percent of the total revenues derived from the tax imposed under section 270.91, subdivision 4, including interest and penalties, as compensation for administering the tax. The county board may reimburse municipalities for the services provided by assessors employed by the municipality in administering sections 270.91 to 270.98.

Supreme Court, U.S.
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No. 98-806

In The

# Supreme Court of the United States

October Term, 1998

JOHN W. WESTLING and SHARON WESTLING,

*Petitioners,*

vs.

COUNTY OF MILLE LACS and STATE OF MINNESOTA,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Minnesota Supreme Court**

## RESPONDENTS' JOINT BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Can the State of Minnesota, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, classify and levy a tax upon environmentally contaminated real property in order to strengthen the local tax base, encourage environmentally responsible behavior by property owners, and encourage cleanup of contaminated property?

TABLE OF CONTENTS

Page

RESPONDENTS' BRIEF IN OPPOSITION..... 1

OPINION BELOW..... 1

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE PETITION..... 6

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE WELL-ESTABLISHED EQUAL PROTECTION PRINCIPLES APPLIED BY THIS COURT..... 8

A. The Court Below Applied A Rational Basis Test Consistent With This Court's Well-Established Standards For Evaluating Equal Protection Challenges To State Tax Statutes .... 8

B. The Court Below Correctly Determined That The Contamination Tax Does Not Violate The Equal Protection Clause..... 12

C. Petitioners' Argument That The Decision Below Conflicts With a Fundamental Constitutional Principle Of Property Taxation Does Not Support Their Equal Protection Challenge..... 15

II. THE DECISION BELOW DOES NOT WARRANT REVIEW BY THIS COURT BASED ON ANY IMPORTANT QUESTION OR ANY CONFLICT WITH OTHER APPELLATE DECISIONS ..... 21

CONCLUSION ..... 23

# TABLE OF AUTHORITIES

Page

CASES

*Adams Express Co. v. Ohio State Auditor*, 166 U.S. 185 (1897) ..... 17

*Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989) ..... 9

*Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232 (1890) ..... 17

*Cumberland Coal Co. v. Board of Revision of Tax Assessments*, 284 U.S. 23 (1931) ..... 16

*Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288 (1921) ..... 16

*Federal Communications Comm'n v. Beach Communication*, 508 U.S. 307 (1993) ..... 10

*General Motors Corp. v. Tracy*, 519 U.S. 278, 117 S. Ct. 811 (1997) ..... 9, 10

*Hopkins v. Southern Cal. Tel. Co.*, 275 U.S. 393 (1927) .... 16

*Kuiters v. County of Freeborn*, 430 N.W.2d 461 (Minn. 1988) ..... 11

*Madden v. Kentucky*, 309 U.S. 83 (1940) ..... 9

*Miller Brewing Co. v. State*, 283 N.W.2d 353 (Minn. 1979) ..... 11

*Nordlinger v. Hahn*, 505 U.S. 1 (1992) ..... 8, 9, 10, 17

*Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) ..... 9

*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) ..... 9

TABLE OF AUTHORITIES – Continued

Page

*Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923) ..... 16

*Wagner v. City of Covington*, 251 U.S. 95 (1919) ..... 17

*Westling v. County of Mille Lacs*, 543 N.W.2d 91 (Minn. 1996) ..... 4

*Westling v. County of Mille Lacs*, 581 N.W.2d 815 (Minn. 1998) ..... *passim*

*Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) .... 17

*WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968) ..... 17

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V ..... 5

U.S. Const. amend. XIV ..... 5, 6, 11, 16

Minn. Const. art. I, § 13 ..... 5

Minn. Const. art. X, § 1 ..... 5, 11

STATUTES

Minn. Stat. ch. 18D (1996) ..... 2

Minn. Stat. §§ 115B.01-.241 (1996) ..... 2

Minn. Stat. §§ 270.91-.98 (1996) ..... 1

Minn. Stat. § 270.91 (1996) ..... 2

Minn. Stat. § 270.91, subd. 1 (1996) ..... 1, 19

Minn. Stat. § 270.91, subd. 2 (1996) ..... 2

Minn. Stat. § 270.91, subds. 3 and 4 (1996) ..... 19

TABLE OF AUTHORITIES – Continued

Page

Minn. Stat. § 270.91, subds. 3 and 4(d) (1996) .....2, 3

Minn. Stat. § 270.91, subd. 4(a)-(c) (1996) ..... 3

Minn. Stat. § 270.93 (1996) .....2, 19

Minn. Stat. § 270.94 (1996) ..... 3

Minn. Stat. § 273.13 (1996) ..... 2

## RESPONDENTS' BRIEF IN OPPOSITION

Respondents State of Minnesota and County of Mille Lacs respectfully request that this Court deny the Petition for a Writ of Certiorari (hereinafter "Petition" or "Pet.") seeking review of the decision of the Minnesota Supreme Court in this case.

## OPINION BELOW

The decision of the Minnesota Supreme Court is reported at 581 N.W.2d 815 (Minn. 1998) and is reprinted in the Appendix to the Petition (hereinafter "Pet. App.") at pages A-1 to A-16.

## STATEMENT OF THE CASE

This case arises from Petitioners' challenge to the constitutionality of the contamination tax imposed under the tax laws of the State of Minnesota in Minn. Stat. §§ 270.91-.98 (1996). *See* Pet. App. A-29 to A-35. The contamination tax is imposed on real property where the presence of certain environmental contaminants has resulted in a reduction of market value for ad valorem property tax purposes. *See* Minn. Stat. § 270.91, subd. 1 (1996); Pet. App. A-29. The amount of the tax is calculated based upon several factors, including the property's "contamination value," the "class rate" used for ad valorem property tax purposes for the type of property involved, the property owner's legal responsibility for

the contamination under certain state environmental statutes,[1] and whether a cleanup plan has been approved or implemented to remedy the contamination. *See* Minn. Stat. § 270.91 (1996); Pet. App. A-29 to A-31. "Contamination value" is defined by law as "the amount of the market value reduction, if any, that is granted for general ad valorem property tax purposes for the assessment year because of the presence of contaminants." Minn. Stat. § 270.93 (1996); Pet. App. A-32. "Class rates" for different types of real property, such as residential, agricultural, and industrial property, are established under Minn. Stat. § 273.13 (1996).

The contamination tax creates an incentive for property owners to clean up environmental contamination, and functions to recapture a portion of the tax revenue lost due to market value reductions stemming from continuing, unremedied contamination. The rate of the contamination tax, and thus the strength of the cleanup incentive and the extent of the revenue recapture, depends upon the owner's legal responsibility for the contamination and the status of any cleanup action. The initial rate of the contamination tax is calculated by multiplying 100 percent of the class rate for the property type by the contamination value of the property. *See* Minn. Stat. § 270.91, subd. 2 (1996); Pet. App. A-29. This yields

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[1] The rate of the contamination tax takes into account whether the property owner is a person responsible for the contamination under either of two state statutes, the Minnesota Environmental Response and Liability Act, Minn. Stat. §§ 115B.01-.241 (1996), and the agricultural chemical incident response law, Minn. Stat. ch. 18D (1996). *See* Minn. Stat. § 270.91, subds. 3 and 4(d) (1996); Pet. App. A-29 to A-31.

the highest contamination tax rate. When the property owner is implementing an approved cleanup plan to remedy the contamination, the tax is calculated using 50 percent of the class rate, thus cutting the contamination tax rate in half. *See* Minn. Stat. § 270.91, subd. 4(a)-(c) (1996); Pet. App. A-30. If the property owner is not legally responsible for the contamination, the class rate used to calculate the tax is reduced to 25 percent, with a further reduction to 12.5 percent if a non-responsible person is implementing an approved cleanup plan. *See* Minn. Stat. § 270.91, subds. 3 and 4(d) (1996); Pet. App. A-30 to A-31. When cleanup under an approved plan is complete, the contamination tax no longer applies. *See* Minn. Stat. § 270.94 (1996); Pet. App. A-32 to A-33.

Petitioners own certain real property in Mille Lacs County, Minnesota. The property is industrial property, including an 88,000 square foot office and warehouse building. The property is leased by Petitioners for an annual rent of $114,000 to Westling Manufacturing Company, an automotive parts remanufacturing business. *See Westling v. County of Mille Lacs*, 581 N.W.2d 815, 817 (Minn. 1998); Pet. App. A-2. The property is contaminated with tetrachloroethene, a chemical used in the remanufacturing process. *See id.;* Pet. App. A-2. Petitioner John Westling is the president of Westling Manufacturing Company, and has been determined to be legally responsible for contamination of the property. *See id.* at 817-18 and n.2; Pet. App. A-2 to A-3 and n.2. Based on the presence of contamination on the property, Petitioners sought a reduction in the market value of the property for ad valorem property tax purposes. After several judicial proceedings on the question of valuation, Mille Lacs

County reduced the assessed market value of the property, taking environmental contamination into account, to zero.[2]

Because the assessed market value of the property for ad valorem tax purposes was reduced to zero, Petitioners paid no ad valorem property tax on the subject property in 1994 and 1995. However, under the contamination tax statute at issue in the case below, Mille Lacs County was required to assess a contamination tax on Petitioners' property, because the reduction in market value granted for the property had been caused by the environmental contamination. Mille Lacs County calculated a contamination tax for Petitioners' property by multiplying its "contamination value" (the amount by which the property's market value had been reduced due to contamination) by 50 percent of the class rate for industrial property (the class rate reduction applicable because Petitioners were implementing an approved cleanup plan to remedy the contamination). *See Westling*, 581 N.W.2d at 819; Pet. App. A-6. This calculation resulted in an assessment of contamination taxes for Petitioners' property of $22,278.50 payable in 1995, and $36,000 payable in 1996.

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[2] The market value reduction was granted by Mille Lacs County after the Minnesota Supreme Court decided *Westling v. County of Mille Lacs*, 543 N.W.2d 91, 93 (Minn. 1996), which affirmed the Minnesota Tax Court's decision that Petitioners' property had zero market value for ad valorem property tax purposes due to the presence of environmental contamination. The procedural history of Petitioners' tax litigation regarding the market value of this property for ad valorem property tax purposes is summarized in the Memorandum of the Minnesota Tax Court included in the Appendix to the Petition. *See* Pet. App. A-20.

*See id.*; Pet. App. A-6. Petitioners have not contested Mille Lacs County's calculation of the contamination value or contamination tax for the subject property. *See id.* at 819 n.5; Pet. App. A-6 n.5.

Petitioners challenged the constitutionality of the contamination tax by bringing an action against Mille Lacs County in the Minnesota Tax Court. In that action, Petitioners argued that the contamination tax violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (as well as the Uniformity Clause of Article X, Section 1 of the Minnesota Constitution[3]) and the Takings Clause of the Fifth Amendment to the United States Constitution (as well as the similar provision of Article I, Section 13 of the Minnesota Constitution). The Minnesota Tax Court held against Petitioners on both the equal protection and takings arguments, and upheld the tax. *See* Pet. App. A-17 to A-25. Petitioners appealed the same constitutional issues to the Minnesota Supreme Court, which also held against Petitioners on their equal protection and takings challenges, and again upheld the statute.[4] *See Westling*, 581 N.W.2d at 823-24; Pet. App. A-16.

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[3] The Uniformity Clause provides that "[t]axes shall be uniform upon the same class of subjects." Minn. Const. art. X, § 1; Pet. App. A-28.

[4] On October 23, 1997, the Minnesota Supreme Court issued an order to the Attorney General of the State of Minnesota requesting the Attorney General to consider participating in the case. The Attorney General then moved to intervene on behalf of the State in the proceedings before the Minnesota Supreme Court. The court's order granting the State's motion was filed on November 18, 1997.

In their Petition for a Writ of Certiorari, Petitioners argue only that Minnesota's contamination tax violates the Equal Protection Clause of the Fourteenth Amendment. For the reasons that follow, Respondents State of Minnesota and Mille Lacs County urge the Court to deny the Petition.

## REASONS FOR DENYING THE PETITION

Petitioners make two arguments as to why this Court should review the Minnesota Supreme Court's decision denying Petitioners' equal protection challenge to Minnesota's contamination tax. First, Petitioners assert that the decision below is in direct conflict with decisions of this Court in other equal protection challenges to tax statutes. *See* Pet. at 5. Specifically, Petitioners argue that the decision below conflicts with a purported "fundamental constitutional principle" that "imposition of property taxes on any basis other than assessed property value violates the Equal Protection Clause of the Fourteenth Amendment." Pet. at 5-6. Second, Petitioners argue that the case below is an important one for review because it affects many Minnesota property owners. *See* Pet. 5. There is no merit to either of Petitioners' arguments.

First, and most importantly, there is no conflict between the decision below and the equal protection decisions of this Court. Petitioners' argument ignores the well-established decisions of this Court that apply a highly deferential rational basis test in analyzing state tax

legislation. The court below applied constitutional standards that fully comport with the equal protection standards established in this Court's decisions and reached the correct result. Petitioners' argument that the decision below conflicts with a "fundamental constitutional principle" that property may be taxed only on the basis of assessed property value completely misses the mark. *See* Pet. at 5-6. Under the decisions of this Court, the only question to be decided in an equal protection challenge to a state tax classification is whether the difference in treatment imposed by the classification rationally furthers a legitimate state interest. Petitioners have cited no precedents of this Court that hold that assessed property value is the only basis on which a state legislature may classify property for tax purposes.

Second, the case below is not sufficiently important to warrant review by this Court. The decision below affects only the taxation of real property within the State of Minnesota, under a statute that is based on particular local circumstances. There is nothing in the record below to support Petitioners' assertion that the tax affects "many Minnesota property owners." Nor do Petitioners make any assertion that the challenged tax statute discriminates against foreign citizens or corporations. Furthermore, there is no conflict between the decision in the case below and the holding of any federal appellate court or other state court of last resort, and Petitioners do not assert that any such conflict exists.

For these reasons, as more fully explained below, the Petition for a Writ of Certiorari should be denied.

## I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE WELL-ESTABLISHED EQUAL PROTECTION PRINCIPLES APPLIED BY THIS COURT.

Petitioners incorrectly assert that the decision of the court below, upholding Minnesota's contamination tax on equal protection grounds, conflicts with decisions of this Court. There is no conflict. Petitioners' argument ignores the standards established by this Court to determine whether a tax classification violates the Equal Protection Clause. This case simply involves the application of the well-established rational basis test to the particular Minnesota tax challenged. The Minnesota Supreme Court applied the correct standards and reached the correct result in the decision below, concluding that Minnesota's contamination tax does not violate the Equal Protection Clause.

### A. The Court Below Applied A Rational Basis Test Consistent With This Court's Well-Established Standards For Evaluating Equal Protection Challenges To State Tax Statutes.

The equal protection principles applied by this Court recognize that most laws differentiate between classes of persons and that the Equal Protection Clause does not forbid such classifications. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Thus, this Court has consistently held that a statutory classification that neither infringes upon a fundamental constitutional right nor is based upon a suspect characteristic must be upheld so long as it satisfies a rational basis test. *See id.* at 10 and cases cited therein. This Court has consistently applied the rational basis test

to state tax legislation. *See General Motors Corp. v. Tracy*, 519 U.S. 278, ___, 117 S. Ct. 811, 830 (1997); *Nordlinger*, 505 U.S. at 10-13; *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 343-44 (1989).

Under well-established standards for analyzing equal protection challenges, state legislatures are given especially wide latitude in making tax classifications. In this oft-quoted passage from *Madden v. Kentucky*, this Court stated:

> [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons or classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

309 U.S. 83, 88 (1940) (footnotes omitted); *see, e.g., Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-41 (1973).

Under this Court's rational basis test, a tax classification does not violate the Equal Protection Clause so long as the classification "rationally furthers a legitimate state interest." *Nordlinger*, 505 U.S. at 11. In *Nordlinger v. Hahn*, this Court indicated that three factors should be considered in determining whether the Equal Protection Clause is satisfied. *See* 505 U.S. at 11. First, a court should consider whether "there is a plausible policy reason for the classification." *Id.* Second, a court should consider whether "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker." *Id.* Third, the court must determine that the relationship of the classification to its purpose is not so attenuated as to render the distinction arbitrary or irrational. *See id.* This Court has continued to apply this rational basis test in other cases and it need not be reconsidered. *See, e.g., General Motors Corp.*, 519 U.S. 278 at ___, 117 S. Ct. at 830 (1997); *Federal Communications Comm'n v. Beach Communication*, 508 U.S. 307, 314-15 (1993).

Like this Court, the Minnesota Supreme Court applies a rational basis test in evaluating equal protection challenges to tax statutes. The court below articulated the rational basis test as follows:

> The test consists of three prongs; (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an

> evident connection between the distinctive needs peculiar to the class and the prescribed remedy; (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

*Westling v. County of Mille Lacs*, 581 N.W.2d 815, 820 (Minn. 1998); Pet. App. A-8 (quoting *Miller Brewing Co. v. State*, 283 N.W.2d 353, 356 (Minn. 1979)). This is the test applied by the Minnesota Supreme Court in determining that the contamination tax satisfies equal protection requirements. *See id.* at 820-22; Pet. App. A-8 to A-13.[5]

Although the Minnesota Supreme Court articulates its rational basis test somewhat differently from the test as articulated by this Court, it considers all of the factors required by this Court when it applies its three-pronged test. The first factor in this Court's rational basis test, that there be a "plausible policy reason" for the classification, is considered by the Minnesota Supreme Court under its requirement that the statute must be based on a purpose that the state can legitimately attempt to achieve. *See id.*

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[5] In the court below, Petitioners asserted that the contamination tax violated both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Uniformity Clause of Article X, Section 1, of the Minnesota Constitution. The Minnesota Supreme Court began its analysis of Petitioners' equal protection challenge by restating an earlier holding that the Uniformity Clause of the Minnesota Constitution is no more restrictive upon the legislature's power to tax or classify than the Equal Protection Clause of the Fourteenth Amendment. *See Westling*, 581 N.W.2d at 820; Pet. App. A-7 (citing *Kuiters v. County of Freeborn*, 430 N.W.2d 461, 463 (Minn. 1988)). Thus, the court below applied the same rational basis test to analyze both Petitioners' equal protection and uniformity challenges.

at 820; Pet. App. A-8. The second factor in this Court's rational basis test, that there are "legislative facts" underlying the classification which the legislature may reasonably have considered to be true, is taken into account by the Minnesota Supreme Court under its requirement that the distinctions underlying the classification must be "genuine and substantial" and provide "a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs." *See id;* Pet. App. A-8. The third factor in this Court's rational basis test, that the relationship between the classification and its purpose not be so attenuated as to render the distinction arbitrary or irrational, is considered by the Minnesota Supreme Court under its requirement that there be an evident connection between the public policy sought to be furthered and the prescribed remedy. *See id.;* Pet. App. A-8. Thus, although the Minnesota Supreme Court's rational basis standard is articulated somewhat differently from the test applied by this Court, the standard applied by the court below conforms to the equal protection decisions of this Court.

### B. The Court Below Correctly Determined That The Contamination Tax Does Not Violate The Equal Protection Clause.

Applying its three-pronged rational basis test – a test that fully comports with the principles established by this Court – the Minnesota Supreme Court correctly rejected Petitioners' equal protection challenge to the Minnesota contamination tax.

The Minnesota Supreme Court first considered whether the distinctions underlying the contamination

tax were genuine and rational ones. The court determined that the legislature used three criteria to classify property under the contamination tax statute: (1) whether the property had experienced a market value reduction due to contamination; (2) whether the owner was legally responsible for the contamination; and (3) whether an approved cleanup plan to remedy the contamination had been implemented.[6] *See Westling*, 581 N.W.2d at 820-21; Pet. App. A-10. The court further found that these legislative criteria were based on recognition of certain facts which, though not articulated in the statute itself, provide a reasonable basis for the legislature to select these criteria. Thus, the court below stated that the criteria

> are based on a recognition that contaminated property diminishes the *ad valorem* property tax base relied upon by local taxing authorities. In addition, the presence of contaminated property in a community may result in increased health risks, in decreased valuations for nearby properties, and in abandonment or underutilization of property, thereby contributing to community blight and economic distress. Contaminated property thereby poses a greater burden on society than uncontaminated property. Further, the long term magnitude of that burden will vary, depending on whether there is a "responsible party" implementing an approved "response plan."

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[6] The Minnesota Supreme Court thus rejected Petitioners' arguments, which they have reiterated in the Petition, that Minnesota's contamination tax statute did not create any new classes of property. *See Westling*, 581 N.W.2d at 820-21; Pet. App. A-8 to A-11; *see also* Pet. at 8.

*Id.* at 821; Pet. App. A-10 to A-11. Based on this discussion, the court correctly concluded that the legislative criteria were genuine and rational bases for creating the separate tax classification for contaminated property. *See id.*; Pet. App. A-11.

The court next considered whether the classification scheme was reasonably related to the purposes of the statute. The court determined that, although the statute does not contain an express statement of legislative purpose, the purposes of the contamination tax can be observed from its operation. *See id.*; Pet. App. A-11. Thus, the court observed that the contamination tax operates to recapture revenue lost to counties that continue to provide services to contaminated properties, and requires the owners to pay some of the costs of the benefits received from such services. *See id.*; Pet. App. A-11. The contamination tax also acts as an incentive to owners to clean up contaminated properties, and encourages responsible behavior by owners of uncontaminated property. *Id.* at 821-22; Pet. App. A-11 to A-12. Based on its analysis of the operation of the tax, the court identified three purposes for the statute: (1) strengthening the local tax base; (2) encouraging environmentally responsible behavior by owners of property; and (3) encouraging cleanup of environmentally contaminated property. *See id.* at 822; Pet. App. A-12. The court then correctly held that the classifications used to enact the contamination tax are rationally related to the purposes effected by the statute. *See id.* at 822; Pet. App. A-13.

Applying the third prong of its rational basis test, the court also considered whether the purpose of the contamination tax is one that the state can legitimately attempt

to achieve. The court determined that the three legislative objectives it had identified based on the operation of the tax "are legitimate public purposes that the legislature may have intended to achieve by enactment of the contamination tax." *Id.*; Pet. App. A-12. The court further held that it was "beyond question" that the generation of revenue and the cleanup of environmental contamination are legitimate government purposes. *See id.*; Pet. App. A-13.

Thus, based upon the application of its three-pronged rational basis test, the Minnesota Supreme Court correctly concluded that the contamination tax did not violate the Equal Protection Clause.[7] *See Westling*, 581 N.W.2d at 822; Pet. App. A-13. The test applied by the Minnesota Supreme Court in this case is fully consistent with the equal protection principles applied by this Court. Therefore, there is no basis for Petitioners' argument that the decision below conflicts with the equal protection decisions of this Court. Accordingly, the Petition for a Writ of Certiorari should be denied.

### C. Petitioners' Argument That The Decision Below Conflicts With A Fundamental Constitutional Principle Of Property Taxation Does Not Support Their Equal Protection Challenge.

In their argument for review, Petitioners avoid discussion of the rational basis test applied by this Court to

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[7] The court also rejected Petitioners' challenge under the takings provisions of the state and federal constitutions. *See Westling*, 581 N.W.2d at 823; Pet. App. A-13 to A-16. Petitioners are not seeking review of that holding.

analyze equal protection challenges and instead claim that the decision below conflicts with the principle that "imposition of property taxes on any basis other than assessed value violates the Equal Protection Clause of the Fourteenth Amendment." Pet. at 5. Petitioners assert that this principle has been "repeatedly held" by this Court and is a "fundamental constitutional principle of taxation." Pet. at 5-6. Petitioners' argument for review lacks merit for several reasons.

First, the cases cited by Petitioners do not support their assertion that this Court has repeatedly, or ever, incorporated into its equal protection jurisprudence the principle that property taxation may only be based upon the assessed value of the property. The cited cases all stand for other principles of law, such as the proposition that individuals within the *same* tax classification are entitled to be treated in the same manner, or that state officials may not intentionally use a discriminatory valuation scheme in assessing properties within the *same* class.[8]

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[8] *See Cumberland Coal Co. v. Board of Revision of Tax Assessments*, 284 U.S. 23, 28-29 (1931) (holding that county commissioners intentionally and systematically undervalued some coal within the same classification of property); *Hopkins v. Southern Cal. Tel. Co.*, 275 U.S. 393, 403 (1927) (construing the purpose of an amendment to the California Constitution); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446 (1923) (holding that county officials may not intentionally tax properties within the same class differently). Another case cited by Petitioners stands for the proposition that it is the effect of a tax which defines its classification rather than the title the legislature gives to the tax. *See Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288, 292-93 (1921). Two cases merely hold that a state may not discriminate against a corporation based solely on its

Petitioners have not asserted that either the contamination tax statute, or its administration by Mille Lacs County tax officials, has treated Petitioners' contaminated property differently from other similar environmentally contaminated property.[9] Therefore, there is no conflict between the decisions of this Court cited by Petitioners and the decision below.

Second, this Court has previously rejected the proposition that state tax classifications must be assessed on "actual" value. *See Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890) (recognizing that "the fourteenth amendment was not intended to compel states to adopt an iron rule of equal taxation" and rejecting the argument that taxes must be based upon "actual" value). This Court recently upheld a property tax classification based upon criteria unrelated to value. *See Nordlinger*, 505 U.S. at 12 (holding that a state's legitimate interest in local neighborhood preservation, continuity, and stability provided a rational basis for assessing property owned by old owners more favorably than property owned by new

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foreign incorporation. *See WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119-20 (1968); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571-72 (1949). The remaining cited cases do not involve an equal protection challenge at all. *See Wagner v. City of Covington*, 251 U.S. 95, 102 (1919) (holding that a state tax statute does not violate the Commerce Clause if it treats all commerce the same); *Adams Express Co. v. Ohio State Auditor*, 166 U.S. 185, 224-25 (1897) (holding that corporations may not escape state tax liability simply because most of their property is intangible).

[9] Petitioners have not contested the county assessor's factual determination of either the contamination value or the contamination tax for their property. *See Westling*, 581 N.W.2d at 819 n.5; Pet. App. A-6 n.5.

owners). The Equal Protection Clause requires only that the basis for a tax classification be a reasonable one, not that it must in all cases be related to property value. The court below applied that requirement and correctly held that the classifications in the Minnesota contamination tax are reasonable.

Third, by focusing their argument on the purported "fundamental principle" that taxation of property on any basis other than assessed value violates the Equal Protection Clause, Petitioners have misstated the holding in the case below and ignored the legal principles supporting that holding. Petitioners' claim that the Minnesota Supreme Court approved a tax statute that arbitrarily imposes a tax upon "fictional" or "imaginary" value in violation of the Equal Protection Clause. *See* Pet. at 7. Similarly, Petitioners view the equal protection issue in this case as whether the state legislature has the ability "to create fictional property values and then direct that taxes be assessed upon those 'values' as if they represented actual pecuniary value." Pet. at 11. Contrary to Petitioners' assertions, both the contamination tax statute and the court's analysis in the decision below make clear that there is nothing fictional or imaginary about the factors used to determine the contamination tax. Petitioners' arguments distort the language and operation of the contamination tax statute, as well as the analysis and decision of the court below which upheld the statute on equal protection grounds.

To begin with, the dollar amount to which the contamination tax is applied, the "contamination value" as defined by the statute is based on considerations of

value. It is calculated in each assessment year by determining the difference between the property's initial market value for ad valorem property tax purposes in that year (the property value but for contamination), and the value to which it is reduced in that year because contaminants are present on the property. *See* Minn. Stat. § 270.93 (1996); Pet. App. A-32. In 1994 the initial market value of Petitioners' property was $1,033,400, but its market value was reduced to zero due to contamination, yielding a difference – the contamination value – of $1,033,400. *See Westling v. County of Mille Lacs*, 581 N.W.2d at 819; Pet. App. A-6. In 1995, the initial market value increased to $1,600,000 but the reduced value remained at zero, for a contamination value of $1,600,000. *Id.*; Pet. App. A-6. It is this contamination value, a dollar figure determined by Mille Lacs County based on considerations of value, that serves initially as the basis for calculating a contamination tax on the property. *See* Minn. Stat. § 270.91, subd. 1 (1996); Pet. App A-29. Mille Lacs County's calculation of contamination value was not contested by the Petitioners in the proceedings below. *See Westling v. County of Mille Lacs*, 581 N.W.2d at 819 n.5; Pet. App. A-6 n.5.

Once contamination value was calculated, the amount of the contamination tax actually payable by Petitioners was determined by multiplying the contamination value by a rate that depends upon whether Petitioners were legally responsible for the contamination and whether they were implementing an approved plan to remedy the contamination. *See* Minn. Stat. § 270.91, subds. 3 and 4 (1996); Pet. App. A-29-31. Because Petitioner John Westling was determined to be legally responsible for the contamination and because Petitioners

are implementing an approved cleanup plan, Mille Lacs County calculated the contamination tax payable by Petitioners by multiplying the contamination value by a rate of 50 percent of the class rate for industrial property. *See Westling*, 581 N.W.2d at 819; Pet. App. A-6. Petitioners did not contest Mille Lacs County's calculation of the contamination tax. *See id.* at 819 n.5; Pet. App. A-6 n.5.

Furthermore, the reasonableness of the statutory mechanism for imposing this tax on contaminated property was thoroughly addressed by the court below using a rational basis analysis consistent with the decisions of this Court. The court below found that the contamination tax reasonably serves legitimate public purposes of strengthening local tax base, encouraging environmentally responsible behavior by property owners, and encouraging cleanup of contaminated property. *See id.* at 822; Pet. App. A-12. In short, nothing in the decision below, or in the contamination tax statute, supports Petitioners' assertion that the Minnesota Supreme Court has approved a statute that arbitrarily creates a tax on "fictional" or "imaginary" values. Therefore, the question presented in this case under the Equal Protection Clause is not, as Petitioners have stated it, whether Minnesota can impose a tax on fictional value. Rather, the question is whether Minnesota's contamination tax constitutes a proper tax classification that meets the requirements of the Equal Protection Clause. Respondents have restated the question to accurately reflect the issues considered and decided by the Court below, and to correctly identify the question that would be before this Court if certiorari were granted.

For all of the reasons stated above, there is no conflict between the decision of the Minnesota Supreme Court in this case and the well-established equal protection principles applied by this Court to state tax legislation. Therefore, Petitioners' argument that there is a conflict is without merit and the Petition for a Writ of Certiorari should be denied.

## II. THE DECISION BELOW DOES NOT WARRANT REVIEW BY THIS COURT BASED ON ANY IMPORTANT QUESTION OR ANY CONFLICT WITH OTHER APPELLATE DECISIONS.

Petitioners assert that the question presented by the case below is an important one because "it affects many Minnesota property owners." Pet. at 5. There is no evidence in the record below to support this assertion. There is no reason to believe that the tax will have a large impact within the State of Minnesota.

In addition, there is no evidence that this case will have any impact outside of Minnesota. The tax applies only to real property located in the State of Minnesota and was enacted in response to a perceived local problem. Petitioners do not assert that the tax discriminates against foreign citizens or corporations. The statute appears to be unique to Minnesota; Petitioners have not cited, and Respondents are not aware of, any similar statutes of other states. Thus there is no reason to believe that this issue will recur in other jurisdictions.

Finally, Petitioners have not cited and Respondents are not aware of any conflict between the decision below and any decision of any federal court of appeals or state appellate court of last resort. Therefore, no review is needed to resolve any conflict between the decisions of lower courts.

## CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: December 17, 1998

Respectfully submitted

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Supreme Court, U.S.
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No. 98-806

In the
# Supreme Court of the United States
October Term, 1998

John W. Westling and Sharon Westling,
*Petitioners,*

v.

County of Mille Lacs, and
The State of Minnesota,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents County of Mille Lacs and the State of Minnesota oppose this Petition for Certiorari on the grounds that the constitutional violation at issue is largely unprecedented. They argue that no decision of this Court expressly prohibits the creation of, and subsequent taxation of, make-believe property values, and that apparently no other state has yet thought to do such a thing. Accordingly, they contend, this Court should ignore the case, presumably until other States have reached the inevitable conclusion that there is no better means of revenue enhancement than to declare new, previously unimagined property values, and tax them.

The Court should take this opportunity to make clear that the Constitution prohibits such "creative" means of taxation and grant the Petition for Certiorari in this case. The County of Mille Lacs did violate the Equal Protection Clause when it, pursuant to Minnesota statute, declared Petitioners' real property to have a taxable "contamination value," and then taxed that value. As a result, the Petitioners' real property, which Respondents concede has a market value of zero, was taxed as if it were worth more than one million dollars. The Minnesota Supreme Court's acceptance of the Respondents' arguments that such an abuse of the tax system constitutes nothing more than a rational "classification" warrants review. That decision distorts (and thereby conflicts with) this Court's rulings, and the fact that only one state may have yet had the audacity to violate the Constitution in this manner in no way diminishes the importance of the principle that a state may not tax a purported property value that simply does not exist.

If this Court agrees that what Respondents have done in this case is to merely create a new "classification," then it should deny this Petition. Such a conclusion would, however, be unprecedented, and would constitute an almost Orwellian use

of the language. Creation of a new type of "value" in no way resembles the sorts of the decisions that this court has previously considered to constitute "classifications"—decisions regarding what type of property may be taxed at what rates or what property should be taxed and what property should be exempt from taxation. *Cf. Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890) (listing the types of legislative decisions to which the courts will defer).

Petitioners do not challenge the "classification" into which their real property was placed or even the aspects of the contamination tax statute that provide for different tax rates depending on the taxpayer's responsibility for and remediation of the environmental contamination. Rather, Petitioners challenge the so-called "value" that the legislature saw fit to define by fiat and then tax. There is, quite simply, no precedent for finding that the creation of heretofore unheard of property "values" constitutes no more than a new "classification" of real property for tax purposes.

The only support Respondents find in this Court's decisions are its upholding of taxation based on property values that either are *less than* market value or, though perhaps differing from market value, nonetheless have a direct counterpart in the real world. *See Nordlinger v. Hahn*, 505 U.S. 1 (1992); *Bell's Gap*, 134 U.S. 232; *see also* Resp. Jt. Br. 17. In *Nordlinger*, this Court merely upheld California's infamous Proposition 13, which in relevant part limited increases in real property appraisals to two percent per year. The consequence, claimed a taxpayer, was that some property was taxed at less than market value. Not surprisingly, the Court found such limitations in the rate of growth of property taxation to be constitutionally permissible. How that holding supports the

intentional *overvaluation* of real property, as in this case, is less than clear. The Court's decision in *Bell's Gap* is even less germane. There the Court upheld Pennsylvania's taxation of the interest paid on corporate bonds based on the face value of those bonds. 134 U.S. 232. A corporation challenged the tax on the grounds that some bonds' market value differed from their face value. The Court found that the interest payments, which were what was being taxed, were based on the face value of the bonds, and so the State did not violate the Constitution when it based the tax on the interest payments on the same valuation.

Respondents in this case can point to no "real world" analogue to the "contamination value" in this case. Petitioners challenge not only the fact that so-called "contamination value" differs from market value, but the contention that there is such thing as contamination value. The only realm in which this "value" exists is in the Minnesota tax code. Assigning such a "value" to Petitioners' real property and then taxing it violates the Constitution because it is arbitrary, capricious, and discriminatory. No decision of this Court condones such a practice, and numerous decisions, as discussed in the Petition, require that property valuation bear some relationship to market value.

The Minnesota Supreme Court's decision upholding the contamination tax statute conflicts with decisions of this Court. And, although numerous states have not yet realized the benefits to be had from the taxation of fictional property values, the constitutional violation committed in this case is important. Petitioners ask, therefore, that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

Dated: January 6, 1998

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